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NAHID HOUMAN

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT COURT OF CALIFORNIA

NAHID HOUMAN, an individual;

Plaintiff,

v.

WELLS FARGO BANK, N.A., as
Successor by Merger to Wachovia
Mortgage, FSB, Formerly Known as
World Savings Bank, FSB; WELLS
FARGO HOME MORTGAGE;
CAL WESTERN RECONVEYANCE
CORPORATION; ALL PERSONS
UNKNOWN, CLAIMING ANY
LEGAL OR EQUITABLE RIGHT,
TITLE ESTATE, LIEN OR INTEREST
IN THE PROPERTY DESCRIBED IN
THE COMPLAINT ADVERSE TO
PLAINTIFF'S TITLE, OR ANY
CLOUD ON PLAINTIFF'S TITLE
THERETO, and DOES 1 to 10,
inclusive;

Defendants.

Case No.: 2:15-cv-08740-AB-PLA

**PLAINTIFF NAHID HOUMAN'S
OPPOSITION TO DEFENDANT
WELLS FARGO BANK, N.A.'S
NOTICE OF MOTION AND
MOTION TO DISMISS
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES**

Hearing Date: December 21, 2015
Time: 10:00 a.m.
Ct rm: 4, 2nd Floor

[Assigned to the Hon. Andre Birotte, Jr.]

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1 **TO DEFENDANT, DEFENDANT’S COUNSEL OF RECORD, THE**
 2 **CLERK OF THE ABOVE-ENTITLED COURT AND THE HONORABLE**
 3 **JUDGE ANDRE BIROTTE, JR., UNITED STATES DISTRICT JUDGE**
 4 **PRESIDING:**

5 PLEASE TAKE NOTICE that Plaintiff Nahid Houman (“Plaintiff” or
 6 “Houman”) hereby responds to Defendant Wells Fargo Bank, N.A., successor by
 7 merger with Wells Fargo Bank Southwest, N.A., f/k/a Wachovia Mortgage, FSB,
 8 f/k/a World Savings Bank, FSB, erroneously sued here separately as Wells Fargo
 9 Home Mortgage (“Wells Fargo”) Notice Of Motion and Motion To Dismiss
 10 Complaint as follows:

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. RELEVANT FACTS**

13 On or about September 3, 2015, Plaintiff commenced an action in the
 14 Superior Court of the State of California for the County of Los Angeles, Case No.
 15 BC593499 (the “State Court Action”) for Wells Fargo’s 1) Breach of Contract and
 16 Violation of Court-Approved Settlement Agreement; 2) Violation of Civil Code
 17 Section 2923.55; 3) Violation of Business and Professions Code Section 17200; 4)
 18 Violations of the Equal Credit Opportunity Act; and 5) Elder Financial Abuse.
 19 Defendant Wells Fargo did not generally appear in the State Court Action.

20 On or about November 9, 2015, Defendant Wells Fargo removed the matter
 21 to this Court based upon federal question jurisdiction, pursuant to U.S.C. §§
 22 1441(b) & 1331 or, as an alternative, diversity of citizenship, pursuant to 28 U.S.C.
 23 § 1332 and Defendant Wells Fargo filed its motion to dismiss the Complaint for
 24 lack of subject matter jurisdiction pursuant to Federal Rules of Civil Procedure
 25 12(b)(1) and for failure to state a claim pursuant to Federal Rules of Civil
 26 Procedure 12(b)(6). Additionally, Wells Fargo moves to dismiss all claims
 27 pursuant to Federal Rules of Civil Procedure 9(b) in connection with this action.
 28

1. DISCUSSION

A. Federal Question Jurisdiction

Under 28 U.S.C. § 1441(a), a civil action may be removed to the district court where the action is pending if the district court has original jurisdiction over the action. Under 28 U.S.C. § 1332, a district court has original jurisdiction of a civil action where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and the dispute is between "citizens of different states." Section 1332 requires complete diversity, *i.e.*, that "the citizenship of each plaintiff is diverse from the citizenship of each defendant." *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 67-68 (1996). Section 1441 limits removal to cases where no defendant "properly joined and served . . . is a citizen of the State in which such action is brought." 28 U.S.C. §1441(a)(b)(2). Removal statutes are "strictly construe[d] against removal." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance. *Id.* Accordingly, the removing party bears a heavy burden of establishing original jurisdiction in the district court. *Id.*

Plaintiff's fourth cause of action against Defendant Wells Fargo is for violation of the Equal Credit Opportunity Act, commonly known as the "ECOA". Plaintiff's Complaint does not assert any federal causes of action, although the ECOA claim does allege violation of a federal statute. It is a "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Lippitt v. Raymond James Fin. Servs.*, 340 F.3d 1033, 1040 (9th Cir. 2003) (quoting *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986)). Instead, the federal question must be "a necessary element of the well-pleaded state claim" or the plaintiff's right to relief must rely on the resolution of a substantial, disputed question of federal law. *Lippitt*, 340 F.3d at 1042. Rather, Plaintiff only needs to show that she is a member of a protected class whose mortgage assistance application applied

1 directly to Defendant Wells Fargo for an extension and continuation of credit, that
 2 Plaintiff qualified for credit; and was denied credit despite being qualified. Since
 3 Plaintiff can prove all her claims independently under state law, an application of
 4 federal law is not a substantial or "necessary element" of the claims. See *Fardella*
 5 *v. Downey Sav. & Loan Ass'n*, No. 00-4394, 2001 WL 492442, at *3 (N.D. Cal.
 6 May 9, 2001) (finding no federal question jurisdiction because plaintiff could
 7 prove allegedly unfair broker rebate violated California law independently of
 8 RESPA or TILA).

9 **B. Diversity Of Citizenship**

10 Defendant Wells Fargo also contends the court has diversity jurisdiction
 11 to hear the action. "[J]urisdiction founded on [diversity] requires that parties be in
 12 complete diversity and the amount in controversy exceed \$75,000." *Matheson v.*
 13 *Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003); see 28 U.S.C.
 14 § 1332(a)(1) ("The district courts shall have original jurisdiction of all civil actions
 15 where the matter in controversy exceeds the sum or value of \$75,000, exclusive of
 16 interest and costs, and is between . . . citizens of different States . . ."). Federal
 17 courts have jurisdiction only where there is complete diversity, i.e., plaintiff's
 18 citizenship is diverse from that of each named defendant. 28 U.S.C. §§ 1332(a)(1),
 19 (c)(1); see *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68 n. 3 (1996); see also *Cook v.*
 20 *AVI Casino Enters., Inc.*, No. 07-15088, 2008 WL 4890167, *3 (9th Cir. Nov. 14,
 21 2008) (Unpub. Disp.) ("We have jurisdiction only if Cook, a resident of California,
 22 has citizenship which is diverse from that of every defendant," citing *Lewis*, 519
 23 U.S. at 68).

24 **C. Plaintiff's Citizenship**

25 Defendant Wells Fargo's notice of removal alleges that Plaintiff's
 26 citizenship and that of Defendant Wells Fargo is entirely diverse and the amount of
 27 the controversy exceeds \$75,000.00. As support for the allegation, the notice cites
 28 Plaintiff's Complaint, which pleads that Houman is a California resident, based on

1 domicile, as she pleads residency and ownership of a home located at 1123 11th
2 Street, Unit No. 4, Santa Monica, California 90403 – i.e., the subject real property
3 in this action. Plaintiff also claims residency in Los Angeles County.

4 A person is a citizen of the state in which he has his domicile, i.e., a
5 permanent home where he intends to remain or to which he intends to return.
6 See *Gilbert v. David*, 235 U.S. 561, 569 (1915); *Kanter v. Warner-Lambert*
7 *Co.*, 265 F.3d 853, 857 (9th Cir. 2001) ("A person's domicile is her permanent
8 home, where she resides with the intention to remain or to which she intends to
9 return"). A person's residency does not determine citizenship for diversity
10 jurisdiction purposes. *Kanter*, 265 F.3d at 857 ("[T]he diversity jurisdiction statute,
11 28 U.S.C. § 1332, speaks of citizenship, not of residency. To be a citizen of a state,
12 a natural person must first be a citizen of the United States. The natural person's
13 state citizenship is then determined by her state of domicile, not her state of
14 residence. A person's domicile is her permanent home, where she resides with the
15 intention to remain or to which she intends to return. A person residing in a given
16 state is not necessarily domiciled there, and thus is not necessarily a citizen of that
17 state"); see also *Weible v. United States*, 244 F.2d 158, 163 (9th Cir. 1957)
18 ("Residence is physical, whereas domicile is generally a compound of physical
19 presence plus an intention to make a certain definite place one's permanent abode,
20 though, to be sure, domicile often hangs on the slender thread of intent alone, as
21 for instance where one is a wanderer over the earth").

22 Defendant Wells Fargo bases its allegation upon information and belief, that
23 Houman has evidenced her intent to remain in California in the Voluntary Petition
24 for Chapter 7 Bankruptcy in which Plaintiff states she "has been domiciled or has
25 had a residence, principal place of business, or principal assets in this District for
26 180 days immediately preceding the date ..." of the petition.

27 Because allegations concerning a person's residency are not sufficient to
28 establish citizenship, Defendant Wells Fargo cannot meet its burden of establishing

Houman's citizenship merely by citing her allegation of residency. See, e.g., *Palacio Capital Partners, Inc. v. Cha*, No. CV 09-5753 PA (AGRx), 2009 WL 2566772, *1 (C.D. Cal. Aug. 18, 2009) ("Removing Defendant alleges in the Notice of Removal that 'Plaintiff Greg Jeong is a citizen of and domiciled in the State of California.' . . . However, the complaint [] merely states that 'Jeong was and is an individual residing and doing business in Los Angeles County, California. Residency is not the same as citizenship. Accordingly, Removing Defendant's allegation of plaintiff Greg Jeong's citizenship is insufficient"); *Goodfellow v. Merrill*, No. 09cv333-L(NLS), 2009 WL 453109, *1 (S.D. Cal. Feb. 23, 2009) ("Regarding Plaintiff's citizenship, the notice of removal inaccurately paraphrases the allegations in the complaint, which provide the sole basis for NMIS' statement regarding Plaintiff's citizenship. Contrary to the representations in the notice of removal, the complaint alleges that Plaintiff is an individual residing in the County of Los Angeles, State of California, not a citizen. For purposes of diversity jurisdiction, it is citizenship and not residency which matters").

Similarly, the fact that Houman owns the property that is the subject of this lawsuit and resides in California, does not establish that she intends to remain in the state in the future. Defendant Wells Fargo has not adequately shown that Houman is a California citizen. Consequently, Defendant Wells Fargo has not met its burden of establishing that there is complete diversity of citizenship among parties as required by § 1332. The court therefore may lack diversity jurisdiction to hear the action.

D. Defendant Cal-Western Reconveyance Corporation's Citizenship

Defendant Wells Fargo's notice of removal alleges that co-Defendant Cal Western Reconveyance Corporation ("Cal-West") is a California citizen. As such, the notice of removal does not allege that every Defendant is diverse from every plaintiff. See 28 U.S.C. § 1332(a). When federal subject matter jurisdiction is predicated on diversity of citizenship pursuant to 28 U.S.C. 1332(a), complete

1 diversity must exist between the opposing parties. See *Caterpillar Inc. v. Lewis*,
 2 519 U.S. 61, 68, 117 S.Ct. 467, 472 (1996) (stating that the diversity jurisdiction
 3 statute "applies only to cases in which the citizenship of each plaintiff is diverse
 4 from the citizenship of each defendant"). Given that any doubt regarding the
 5 existence of subject matter jurisdiction must be resolved in favor of remanding the
 6 action to state court, see *Gaus*, 980 F.2d at 566, removing Defendant Wells Fargo
 7 has not met its burden. Therefore, there may be no basis for diversity jurisdiction.

8 Instead, Defendant Wells Fargo alleges that co-Defendant Cal-West is to be
 9 ignored for diversity jurisdiction analysis due to the Bankruptcy and Permanent
 10 Injunction Enjoining Legal action filed herewith. *In re Prommis Holdings, LLC, et*
 11 *al.*, United States Bankruptcy Court for the District of Delaware, Case No. 13-
 12 10551 (BLS). Plaintiff, with the Court's permission, will file a motion for limited
 13 relief from stay and election as an "Exempt Plaintiff" to prosecute this action
 14 against Cal-West for recording or causing to record the invalid Notice of Default
 15 ("NOD") against Plaintiff's subject real property.

16 When the citizenship of co-Defendant Cal-West is applied for the reasons
 17 stated above, complete diversity citizenship does not exist under 28 U.S.C. §
 18 1332(a), in that co-Defendant Cal-West is a California citizen and Defendant Wells
 19 Fargo has not met its burden of establishing Houman's citizenship.

20 **E. Federal Rule of Civil Procedure 12(B)(1)**

21 Under Rule 12(b)(1), a defendant may bring a facial attack on the court's
 22 subject matter jurisdiction, in which case, the court "assume[s] [plaintiff's] [factual]
 23 allegations to be true and draw[s] all reasonable inferences in his favor." *Wolfe v.*
 24 *Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Courts do not accept the truthfulness
 25 on any legal conclusions contained in the complaint when assessing a facial attack
 26 on subject matter jurisdiction under Rule 12(b)(1). *Warren v. Fox Family*
 27 *Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Under Rule 12(b)(1), a
 28 defendant may also bring a factual attack on the district court's subject matter

jurisdiction. Unlike a Rule 12(b)(6) motion or a facial Rule 12(b)(1) motion, a factual attack on subject matter jurisdiction under Rule 12(b)(1) affords the district court discretion to consider extrinsic evidence and, if disputed, weigh the evidence to determine whether the facts support subject matter jurisdiction without converting the motion to dismiss into a motion for summary judgment. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In this case, the Court does not presume the truthfulness of the plaintiff's allegations. *Id.* "The presumption of correctness that we accord to a complaint's allegations falls away on the jurisdictional issue once a defendant proffers evidence that calls the court's jurisdiction into question." *Commodity Trend Service, Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 685 (7th Cir. 1998).

F. Federal Rule of Civil Procedure 12(B)(6)

A complaint survives a motion to dismiss under Rule 12(b)(6) if it contains a "short and plain statement of the claim showing that the pleader is entitled to relief," which does not require "detailed factual allegations," but it "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 1949 (2009). A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988); accord *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248 (9th Cir. 1997) ("A complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"). In analyzing the sufficiency of the complaint, allegations of fact are taken as true and construed in the light most favorable to the nonmoving party. See *Newdow v. Lefevre*, 598 F.3d 638, 642 (9th Cir. 2010), cert. denied, 131 S. Ct. 1612 (2011). The Court must first look at the requirements of the causes of action alleged to test the legal sufficiency of the complaint. See *Iqbal*, 556 U.S. at

675.

G. Federal Rule of Civil Procedure 9(B)

Rule 9(b) demands that the circumstances constituting the alleged fraud "be `specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.'" *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009) (quoting *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001)). A party alleging fraud must "set forth more than the neutral facts necessary to identify the transaction." *Id.*

H. Defendant Cal-Western Reconveyance Corporation's Bankruptcy Proceedings

On or about November 9, 2015 Defendant Wells Fargo filed its Notice of Bankruptcy and Permanent Injunction enjoining legal action against Defendant Cal-Western Reconveyance Corporation. Plaintiff seeks permission from the court to file a Limited Motion for Relief from 11 U.S.C. § 362 Automatic Stay And Election As An "Exempt Plaintiff" in the matter of *In Re Prommis Holdings, LLC, et al.*, in the United States Bankruptcy Court For The District Of Delaware, under Case No. 13-10551 (BLS) for the purposes of pursuing this litigation and election as an "Exempt Plaintiff" under The Chapter 11 Liquidation Plan's Injunction Exemption.

II. ARGUMENT

A. THE BANKRUPTCY TRUSTEE AND/OR PLAINTIFF HAS STANDING TO PROSECUTE PRE-BANKRUPTCY CLAIMS.

Plaintiff's case is distinguishable from the cases cited by Defendant Wells Fargo in its Motion to Dismiss. *Sherman v. Wells Fargo Bank, N.A.*, 2011 U.S. Dist. LEXIS 51641 ((E.D. Cal. May 12, 2011)) - dismissed plaintiff's loan modification-based claims for lack of standing where plaintiff's bankruptcy schedules omitted purported claims relating to loan modification discussions and

wrongful foreclosure. *Id.* at *11-13; *In re Lopez (Lopez v. Specialty Restaurants)*, 283 B.R. 22, 28 (9th Cir. BAP 2002). And, “[p]roperty that was not correctly scheduled remains property of the estate forever (until administered or formally abandoned by the trustee..”) *Id.* at 32 (concurring opinion). The Bankruptcy Code permits interested parties to petition to reopen a closed bankruptcy, to administer late-discovered assets. (11 U.S.C. § 350, subd. (b).) Once a closed case is reopened, amended bankruptcy schedules may be filed “as a matter of course” under FRBP 1009(a) –i.e., without court approval. “(f)or the purposes of filing amendments, there is no difference between an opened and reopened case...” [*In re Goswami* (9th Cir. BAP 2003) 304 BR 386, 393 (internal quotes omitted)].

With the Court’s permission, Plaintiff will file a separate motion to reopen Bankruptcy Case No. 2:15-bk-12745-NB and Plaintiff will substitute or join the bankruptcy trustee(s), or show the trustee's ratification of this action, pursuant to the requirements of Federal Rule of Civil Procedure 17(a)(3) (“The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.”). Alternatively, Plaintiff will provide to the court the bankruptcy trustee(s) abandonment of the claims against Defendants or that this action is exempt from or should be excluded from the bankruptcy estate(s).

B. THE BANKRUPTCY TRUSTEE AND/OR PLAINTIFF MAY PROSECUTE CLAIMS NOT DISCLOSED IN HOUMAN’S BANKRUPTCY SCHEDULES.

Defendant Wells Fargo argues that Plaintiff is judicially estopped from prosecuting claims not disclosed in her bankruptcy schedules. Plaintiff filed her first bankruptcy petition on June 6, 2014, United States Bankruptcy Court, Central District of California, Case No. 2:14-bk-21133-VZ. The case was dismissed in

September 2014. (*See* Def. RJN Exh. L). Plaintiff "did not submit a reorganization plan, creditors did not accept a plan, and the bankruptcy court did not review or confirm a plan." The case "was dismissed without a determination as to any purported debts 3 months later. Plaintiff filed her second bankruptcy petition February 2015 under Chapter 13 and later converted the case to a Chapter 7, United States Bankruptcy Court, Central District of California, Case No. 2:15-bk-12745-NB. In July 2015, Plaintiff received a Chapter 7 discharge. (*See* Def. RJN Exh. O, Discharge Order). The failure to schedule the instant claims was a matter of inadvertence or mistake and thus should not prevent Plaintiff from pursuing those claims now. Plaintiff did not realize at the time she filed for bankruptcy that she might have a claim against Defendant Wells Fargo because she thought she was still negotiating with Defendant Wells Fargo through its employees to try to modify her loan. Therefore, judicial estoppel may be inappropriate "when a party's prior position was based on inadvertence or mistake." *New Hampshire v. Maine*, 532 U.S. 742, 753 (2001) (internal quotation marks omitted). "Inadvertence" and "mistake" have been interpreted broadly by the Ninth Circuit. *See Ah Quin v. Cnty. of Kauai Dep't of Transp.*, 733 F.3d 267, 276 (9th Cir. 2013) ("inadvertence or mistake" not limited to plaintiff's knowledge of claim and motive to conceal). Based on the broad interpretations of these terms, Plaintiff can plead sufficient facts to overcome Defendant Wells Fargo's judicial estoppel argument. With the Court's permission, Plaintiff requests leave to file an amended complaint pursuant to Fed. R. Civ. P. 15(a)(2).

C. PLAINTIFF'S SECOND, THIRD AND FIFTH STATE LAW CLAIMS ARE NOT PRE-EMPTED BY HOLA.

Defendant Wells Fargo contends that Plaintiff's state law claims are pre-empted by HOLA. Courts review HOLA pre-emption independently, as a matter of law. *Gibson v. World Savings & Loan Assn.* (2002) 103 Cal.App.4th 1291, 1297 [128 Cal.Rptr.2d 19] [Fourth Dist., Div. Two]. The doctrine of federal preemption

1 is based on article VI, clause 2 of the federal Constitution, which directs that "the
 2 Laws of the United States ... shall be the supreme Law of the Land; ... any Thing in
 3 the Constitution or laws of any State to the Contrary notwithstanding." (U.S.
 4 Const., art. VI, cl. 2.) "Whether federal law preempts state law is fundamentally a
 5 question whether Congress has intended such a result." *Peatros v. Bank of*
 6 *America* (2000) 22 Cal.4th 147, 157 [91 Cal.Rptr.2d 659, 990 P.2d 539].
 7 Congressional intent to preempt may be either express or implied, i.e., either
 8 "explicitly stated in the statute's language or implicitly contained in its structure
 9 and purpose." *Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) 458 U.S.
 10 141, 152-153 [73 L.Ed.2d 664, 102 S.Ct. 3014]. Preemption may result, not only
 11 from action taken by Congress itself, but also from action by a federal agency.
 12 *Louisiana Public Service Comm'n v. FCC* (1986) 476 U.S. 355, 369 [90 L.Ed.2d
 13 369, 106 S.Ct. 1890]. A regulation's preemptive effect "does not depend on express
 14 congressional authorization to displace state law." *Fidelity Federal Sav. & Loan*
 15 *Assn. v. de la Cuesta, supra*, 458 U.S. at p. 154. Instead, the determinative issues
 16 are whether (1) the agency intended its regulation to have a preemptive effect and
 17 (2) the agency acted within the scope of its congressionally delegated authority by
 18 issuing the preemptive regulation. (*Ibid.*) So long as those conditions are met,
 19 "[f]ederal regulations have no less pre-emptive effect than federal statutes." (*Id.* at
 20 p. 153.)

21 Federally chartered savings associations, such as World Savings, are regulated
 22 by HOLA. (12 U.S.C. §§ 1462, 1463.) HOLA creates the Office of Thrift
 23 Supervision (OTS) (12 U.S.C. § 1462a(a)) and authorizes its director to issue
 24 regulations prescribing the operation of federal savings associations according to
 25 the "best practices of thrift institutions in the United States." (12 U.S.C. § 1464(a).)
 26 In 1996, the OTS issued 12 Code of Federal Regulations part 560.2 (hereafter part
 27 560.2 or § 560.2) to address preemption specifically in the context of lending
 28 operations. (61 Fed.Reg. 50951, 50952 (Sept. 30, 1996).) Part 560.2 states that the

1 "OTS hereby occupies the entire field of lending regulation for federal savings
 2 associations," thereby permitting federal savings associations to extend credit
 3 "without regard to state laws purporting to regulate or otherwise affect their credit
 4 activities, except to the extent provided in paragraph (c) of this section" (§
 5 560.2(a) (2010).) Accordingly, it cannot be questioned that where part 560.2
 6 applies, it preempts any state law which purports to regulate the lending activities
 7 of federal savings associations. *Silvas v. E*TRADE Mortgage Corp.* (9th Cir.
 8 2008) 514 F.3d 1001, 1004-1005.

9 It is well established, however, that part 560.2 does not apply to contractual
 10 obligations voluntarily undertaken by a federal savings association. Such
 11 obligations are not imposed by state law. *Gibson v. World Savings & Loan Assn.*,
 12 *supra*, 103 Cal.App.4th at p. 1302, citing *Cipollone v. Liggett Group, Inc.* (1992)
 13 505 U.S. 504, 526 [120 L.Ed.2d 407, 112 S.Ct. 2608]. Moreover, part 560.2 both
 14 expressly applies only to state law, defined as "'any state statutory regulation,
 15 ruling[,] order or judicial decision'" *Wells v. Chevy Chase Bank, F.S.B.* (2003) 377
 16 Md. 197 [832 A.2d 812, 824] (*Wells*), quoting § 560.2(a) (2003), and expressly
 17 exempts from preemption state "'contract and commercial law ... that ... only
 18 incidentally affects the lending operations of Federal savings associations or [is]
 19 otherwise consistent with' the purpose of the regulations" *Wells*, 832 A.2d at p.
 20 823, quoting § 560.2(c) (2003). "That intention was confirmed in 61 Fed.Reg. at
 21 50966: 'OTS wants to make clear that it does not intend to preempt basic state laws
 22 such as state uniform commercial codes and state laws governing real property,
 23 contracts [or] torts' [Citations.]" (*Wells*, at p. 823; see also extensive discussion
 24 in *Wells*, at pp. 823-827.)

25 Defendant Wells Fargo contends that Plaintiff's second, third and fourth state
 26 law claims are preempted by HOLA because the loan originated with a federal
 27 savings bank (*See* Def. MTD Pg.1), all of the claims here involve modification
 28 related activity to change the Loan terms (*See* Def. MTD Pg.10) and Plaintiff

1 challenges Defendant Wells Fargo's servicing activity relating to pre-foreclosure
 2 contact and other Loan servicing-related issues (*See* Def. MTD Pg.11). Defendant
 3 Wells Fargo contends that this falls within the categories of lending activities,
 4 including processing and servicing of a mortgage, as to which HOLA preempts
 5 state law. (§ 560.2(b)(10) (2010).) This argument overreaches, as the language
 6 Defendant Wells Fargo quotes pertains to "state laws purporting to impose
 7 requirements regarding.... lending activities, including processing and servicing of
 8 a mortgage, as to which HOLA preempts state law (§ 560.2(b)(10) (2010).) not to
 9 *allegations* that touch on such subjects.

10 Plaintiff's case is largely based on contract and tort; such laws are not
 11 preempted if, as here, they only incidentally affect lending. *Id.* "Courts have...
 12 interpreted *Silvas* to not preempt all state law causes of action arising out of loan
 13 modification and/or foreclosure proceedings, but only those that impose new
 14 requirements on the lender." *Rumbaua v. Wells Fargo Bank, N.A.*, No. 11-1998,
 15 2011 WL 3740828, at *7 (N.D.Cal. Aug. 25, 2011).

16 Where plaintiff's claims have centered on a bank's "inadequate disclosures of
 17 fees, interest rates, or other loan terms," or "inadequate notice of various rights and
 18 procedures during the foreclosure process," those claims have been preempted
 19 because they "would effectively impose requirements that banks include specific
 20 information in loan documents or provide specific notices during foreclosure." *See*
 21 *DeLeon v. Wells Fargo Bank, N.A.*, No. 10-01390, 2011 WL 311376, at *6
 22 (N.D.Cal. Jan. 28, 2011). But where plaintiffs' claims have relied "on a general
 23 duty not to misrepresent material facts, and when application of the law does not
 24 regulate lending activity, California district courts have found that the claims are
 25 not preempted." *Id.* For example, where plaintiffs alleged:

26 that Wells Fargo falsely represented that it would complete a loan
 27 modification agreement and that no foreclosure sale would occur while
 28 the loan modification was pending, [but did] not seek to impose a

substantive requirement that a federal savings bank must always complete a loan modification agreement once the modification process has started or that a federal savings bank can never execute a sale while a loan modification is pending.... [, Plaintiffs were invoking only] the general duty not to engage in fraud or express deception in a manner that only incidentally affects lending activities.

Id. Accordingly, the claim was not preempted. *Id.*; see also *Rumbaua*, 2011 WL 3740828, at *7 (same); *Susilo v. Wells Fargo Bank, N.A.*, 796 F.Supp.2d 1177, 1186 (C.D.Cal.2011) (same).

Here, Plaintiff's claims do not seek to impose additional requirements on Defendant Wells Fargo, nor does Plaintiff depend on the contention that all homeowners are entitled to loan modifications. Instead, similar to *DeLeon*, 2011 WL 311376, Plaintiff's second, third and fifth claims are premised on Defendant Wells Fargo's breach of an obligation or duty to review and process Plaintiff for a loan modification. (Compl. ¶72.). As Plaintiff's claims are based on allegations of material misrepresentations made by Defendant Wells Fargo, they are not preempted, and this basis for dismissal fails. This is a matter of ordinary contract law and has no effect on Defendant Wells Fargo's lending activities.

D. PLAINTIFF STATES A CLAIM FOR RELIEF FOR BREACH OF CONTRACT AND VIOLATION OF THE CLASS ACTION SETTLEMENT AGREEMENT.

1. This Case May Be Transferred To The United States District Court For The Northern District Of California, The Honorable Jeremy F. Fogel, Currently Presiding, Or Any Other Court That Obtains Competent Jurisdiction Of The Lawsuit Under 28 U.S.C. § 1404(A).

Defendant Wells Fargo alleges that Plaintiff fails to state a claim for relief for breach of contract and violation of the class action settlement agreement because: (i) this Court lacks jurisdiction to hear the claim proceedings. A district

1 court may transfer a case pending before it "to any other district or division where
 2 it might have been brought." 28 U.S.C. § 1404(a). Under this section, the district
 3 court has discretion to "adjudicate motions for transfer according to an
 4 individualized, case-by-case consideration of convenience and fairness.' " *Jones v.*
 5 *GNC Franchising, Inc.*, 211 F.3d 495, 498-499 (9th Cir.2000) (quoting *Stewart*
 6 *Org. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S.Ct. 2239, 101 L.Ed.2d 22 (citation
 7 omitted)). A motion to transfer venue under this section requires the court to
 8 consider: (1) the convenience of the parties; (2) the convenience of the witnesses;
 9 and (3) the interests of justice. *Kasey v. Molybdenum Corp.*, 408 F.2d 16, 20 (9th
 10 Cir.1969). The burden is on the moving party to establish that a transfer would
 11 allow a case to proceed more conveniently and better serve the interests of
 12 justice. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th
 13 Cir.1979). "Many considerations have been evaluated by courts under the heading
 14 'the interest of justice.'" *Los Angeles Memorial Coliseum Commission v. National*
 15 *Football League*, 89 F.R.D. 497, 501 (C.D.Ca. 1981). Transfer to the forum
 16 wherein the Settlement Agreement may be enforced makes good judicial sense in
 17 that ultimate responsibility for the action can be resolved completely among all the
 18 essential parties.

19 **2. The Question Of Jurisdiction And The Merits Of The Action Are** 20 **Intertwined**

21 On or about November 1, 2015, Defendant Wells Fargo removed the
 22 instant action to this Court pursuant to U.S.C. §§1441(b) & 1331, based on federal
 23 question jurisdiction and seeks an order dismissing all claims for relief in the
 24 complaint pursuant to Rules 12(b)(1) of the Federal Rules of Civil Procedure.
 25 "[J]urisdictional dismissals in cases premised on federal-question jurisdiction are
 26 exceptional, and must satisfy the requirements specified in *Bell v. Hood*, 327 U.S.
 27 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946)." *Sun Valley Gas., Inc. v. Ernst Enters.*,
 28

1 711 F.2d 138, 140 (9th Cir.1983). In *Bell*, the Supreme Court determined that
 2 jurisdictional dismissals are warranted "where the alleged claim under the
 3 constitution or federal statutes clearly appears to be immaterial and made solely for
 4 the purpose of obtaining federal jurisdiction or where such claim is wholly
 5 insubstantial and frivolous." 327 U.S. at 682-83, 66 S.Ct. 773.

6 District courts have held that a "[j]urisdictional finding of genuinely disputed
 7 facts is inappropriate when 'the jurisdictional issue and substantive issues are so
 8 intertwined that the question of jurisdiction is dependent on the resolution of
 9 factual issues going to the merits' of an action." *Sun Valley*, 711 F.2d at
 10 139 (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983)). The
 11 question of jurisdiction and the merits of an action are intertwined where "a statute
 12 provides the basis for both the subject matter jurisdiction of the federal court and
 13 the plaintiff's substantive claim for relief." *Id.* See also *Thornhill Publ'g Co. v.*
 14 *Gen. Tel. Co.*, 594 F.2d 730, 734 (9th Cir.1979) ("[W]hen a statute provides the
 15 basis for both the subject matter jurisdiction of the federal court and the plaintiffs'
 16 substantive claim for relief, a motion to dismiss for lack of subject matter
 17 jurisdiction rather than for failure to state a claim is proper only when the
 18 allegations of the complaint are frivolous.") (quotation omitted).

19 Defendant Wells Fargo erred in characterizing Plaintiff's Complaint under
 20 Rule 12(b)(1). Plaintiff's jurisdictional issue, Wells Fargo's violation of federal
 21 legislation : 15 U.S.C. §1691, Wells Fargo's violation of a Court approved
 22 settlement agreement and the violation of California foreclosure statutes, are case
 23 related substantive issues so intertwined that the question of jurisdiction is
 24 dependent on the resolution of factual issues going to the merits. Defendant Wells
 25 Fargo has not argued that Plaintiff's claims are "immaterial," "made solely for the
 26 purpose of obtaining federal jurisdiction," or "wholly insubstantial and frivolous."
 27 *Bell*, 327 U.S. at 682-83, 66 S.Ct. 773. Whether Plaintiff alleged a claim that
 28 comes within the Class Action Settlement reach goes to the merits of Plaintiff's

1 action. *Sun Valley*, 711 F.2d at 140 ("[t]he ability of [the plaintiff] to allege a claim
2 that comes within the definitional reach of the [Class Action Settlement] is a matter
3 that goes to the merits of the action.").

4 If the Court determines venue is improper, it may either dismiss the action or,
5 if in the interest of justice, transfer the case to the United States District Court for
6 the Northern District of California, the Honorable Jeremy F. Fogel, currently
7 presiding, or any other court that obtains competent jurisdiction of the Lawsuit in
8 which it could have been originally brought. [28 USC §1406(a); *King v. Russell*
9 (9th Cir. 1992) 963 F2d 1301, 1304 –dismissal proper; *Minnette v. Time Warner*
10 (2nd Cir. 1993) 997 F2d 1023, 1026; see ¶4:575]. A dismissal for improper venue
11 is *not on* the merits and does not preclude refilling the action in another forum
12 (state or federal) where venue is proper. [FRCP 41(b)]. Such a dismissal does not,
13 however, prevent Plaintiff from refilling in state court *Sinochem Int'l Co. Ltd v.*
14 *Malaysia Int'l Shipping Corp.* (2007) 549 US 422, 430-431, 127 S.Ct. 1184, 1191;
15 see *Potter v. Hughes* (9th Cir. 2008) 546 F3d 1051, 1056, fn. 2).

16 **3. The Underlying Action is Distinct, Contains State Law Claims In** 17 **Addition To The Class Action Settlement And Its Loan Modification** 18 **Provisions**

19 The causes of action and relief sought in the *Murphy, D'Alessio,*
20 *McDermed and Gonzalez actions* (See Def. MTD, pg. 14) only contained
21 allegations of breached terms of the Settlement Agreement. Those actions are
22 different to what Plaintiff is pursuing in the underlying action. Plaintiff seeks to
23 adjudicate additional and different state rights and interests, and relies on
24 additional and different evidence. Unlike the nucleus facts in the *Murphy,*
25 *D'Alessio, McDermed and Gonzalez actions.* For example, nowhere in Plaintiff's
26 complaint has she alleged allege that Defendants mailed her multiple and
27 conflicting class notices as in *McDermed.* The *Murphy, D'Alessio, McDermed*
28 *and Gonzalez actions* referenced in Defendant Wells Fargo's motion to dismiss did

1 not contain the Plaintiff's alleged violations of 2923.5 and/or 2923.55, violations
 2 of business and professions code section 17200, violations of the Equal Credit
 3 Opportunity Act or Elder Financial Abuse.

4 **E. PLAINTIFF CAN AMEND THE COMPLAINT TO ALLEGE A**
 5 **VIOLATION OF § 2923.5.**

6 Part of Defendant Wells Fargo's misconduct, as alleged, was the
 7 recordation of the NOD, which occurred on April 26, 2012. (*See* Def. RJN, Ex. E.).
 8 Since the NOD was recorded before January 1, 2013, Plaintiff seeks leave to file
 9 an amended complaint to allege a violation of Cal. Civ. Code § 2923.5 pursuant to
 10 Fed. R. Civ. P. 15(a)(2). Section 2923.5 mandates that "a mortgage servicer,
 11 mortgagee, [deed of trust] trustee, beneficiary, or authorized agent may not record
 12 a notice of default" pursuant to Cal. Civ. Code § 2924 until the mortgage servicer
 13 complies with Cal. Civ. Code § 2924.18(a)(1). Thus, Plaintiff can state a claim
 14 against Defendant Wells Fargo for violation of Cal. Civ. Code § 2923.5. Defendant
 15 Wells Fargo asserts that even if plaintiff invoked the pre-2013 version of 2923.5,
 16 that claim would be subject to a three years statute of limitations pursuant to Cal.
 17 Code of Civ. Proc. section 338(a) since the NOD was recorded in 2012. Based on
 18 the foregoing, the parties do not dispute the three years statute of limitations
 19 pursuant to Cal. Code of Civ. Proc. section 338(a).

20 Plaintiff disagrees as to the discovery date. Plaintiff had no knowledge of, and
 21 no reason to discover, Defendants' misconduct until she hired her attorney in June
 22 2014 and filed her lawsuit in September 2015, well within the three year statute of
 23 limitations pursuant to Cal. Code of Civ. Proc. section 338(a). Plaintiff can amend
 24 the complaint to plead facts describing the time and manner of discovery *and* the
 25 inability to have made earlier discovery despite reasonable diligence.

26 "[O]rdinarily a party to a contract cannot justifiably claim unawareness of the
 27 express provisions of the contract," but "this is not the basis of plaintiffs'" 2923.5
 28 claim. *Fuller v. First Franklin Financial Corp.* (2013) 216 Cal.App.4th 955, 964-

1 965. "[I]t may be that evidentiary facts will ultimately demonstrate the
 2 untimeliness of plaintiff's delayed discovery." (*Id.* at p. 966; see, e.g., *Rivera v.*
 3 *BAC Home Loans Servicing, L.P.* (N.D. Cal. 2010) 756 F.Supp.2d 1193,
 4 1200 [change in loan interest rate might require investigation of certain facts].)
 5 Accepting the Plaintiff's factual allegations as true and construing the pleadings in
 6 the light most favorable to her, Houman can amend the Complaint and sufficiently
 7 allege delayed discovery to survive a motion to dismiss.

8 **F. PLAINTIFF HAS STATED A CLAIM UNDER CALIFORNIA**
 9 **BUSINESS AND PROFESSIONS CODE §17200.**

10 Plaintiff brings her third cause of action under California Business and
 11 Professions Code 17200. (Compl. ¶¶ 50-68.) Section 17200, also known as
 12 California's Unfair Competition Law ("UCL") concerns unfair competition and
 13 prohibited activities. It states that "unfair competition shall mean and include any
 14 unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code §
 15 17200. Each prong of the UCL is a separate and distinct theory of liability. *Lozano*
 16 *v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 731 (9th Cir. 2007). In order to state
 17 a claim for a UCL violation, Plaintiff must identify an underlying statute that
 18 Defendant Wells Fargo violated. *Ingels v. Westwood One Broad. Servs., Inc.*, 129
 19 Cal. App. 4th 1050, 1060 (2005) (no § 17200 liability "for committing 'unlawful
 20 business practices' without having violated another law"). A business practice is
 21 "unlawful," in violation of the California Unfair Competition Law (UCL), if it
 22 violates another state or federal law; the UCL "borrows" violations of other laws
 23 and treats them as independently actionable. *Perea v. Walgreen Co.*, 939 F. Supp.
 24 2d 1026, 1040 (C.D. Cal.2013).

25 Defendant Wells Fargo first argues that Plaintiff's UCL claim is barred by the
 26 failure to disclose in bankruptcy, and preempted by HOLA, the UCL claim must
 27 fail as well. (*See* Def. MTD pg. 18). As stated previously, with the Court's
 28 permission, Plaintiff and/or the Bankruptcy Trustee may pursue this claim.

1 Additionally, since Plaintiff can amend the Complaint to sufficiently allege the
 2 claim that Defendant Wells Fargo violated California laws –specifically Section
 3 2923.5– Defendant’s argument fails. Defendant Wells Fargo also argues that
 4 Plaintiff lacks legal standing to pursue a UCL claim, because she has not “lost
 5 money or property” due to Wells Fargo’s alleged conduct (*See* Def. MTD pg. 18).

6 Defendant Wells Fargo is correct that the UCL requires such a loss. *See* Cal.
 7 Bus. & Prof. Code § 17204. California voters implemented this requirement
 8 through Proposition 64, in order to remove standing for private litigants acting for
 9 the interest of the general public. *See Segura v. Wells Fargo Bank, N.A.*, 2014 WL
 10 4798890, at *8 (C.D. Cal. Sept. 26 2014). “The intent of this change was to confine
 11 standing to those actually injured by a defendant's business practices and to curtail
 12 the prior practice of filing suits on behalf of clients who have not used the
 13 defendant's product or service, viewed the defendant's advertising, or had any other
 14 business dealing with the defendant....” *Kwikset Corp. v. Super. Ct.*, 51 Cal.4th
 15 310, 321 (2011).

16 The California Supreme Court in *Kwikset* found “there are innumerable ways
 17 in which economic injury from unfair competition may be shown [including
 18 having] a present or future property interest diminished.” *Id.* at 323. Plaintiff has
 19 alleged that Defendant Wells Fargo issued a Notice of Default without first
 20 complying with the legal requirements of California non-judicial foreclosure
 21 statutory scheme. (Compl. ¶¶ 56, 58.) These foreclosure proceedings diminish
 22 Plaintiff’s property interest in her home. *See Sullivan v. Washington Mut. Bank,*
 23 *FA*, 2009 WL 3458300, at *4 (N.D. Cal. Oct. 23, 2009) (“it is undisputed that
 24 foreclosure proceedings have been initiated which puts [plaintiff’s] interest in the
 25 property in jeopardy. The Court concludes that this fact is sufficient to establish
 26 standing”); *Woodring v. Ocwen Loan Servicing, LLC*, 2014 WL 3558716, at *9
 27 (C.D. Cal. July 18, 2014) (“This Court agrees with the courts in this Circuit that
 28

1 have on multiple occasions found that the initiation of foreclosure proceedings may
2 suffice to establish an injury under the UCL”)

3 Accordingly, Defendant Wells Fargo Motion to Dismiss Plaintiff’s UCL claim
4 should be denied.

5 **G. PLAINTIFF HAS STATED A CLAIM UNDER THE EQUAL**
6 **CREDIT OPPORTUNITY ACT.**

7 The ECOA "makes it illegal `for any creditor to discriminate against any
8 applicant, with respect to any aspect of a credit transaction . . . on the basis of race,
9 color, religion, national origin, sex or marital status or age.'" *Schlegel v. Wells*
10 *Fargo Bank*, 720 F.3d 1204, 1210 (9th Cir. 2013) (quoting 15 U.S.C. § 1691(a)(1)).
11 Courts have found applications for loan modifications to be applications for credit
12 under the ECOA. *See, e.g., Vasquez v. Bank of Am., N.A.*, 3:13-cv-02902, 2013
13 WL 6001924, at *13 (N.D. Cal. Nov. 12, 2013) ("[T]he Federal Reserve has
14 opined that loan modification requests under the Department of Treasury's Making
15 Home Affordable Modification Program ("HAMP") do qualify as `credit
16 applications' under ECOA, and that loan modifications outside the HAMP should
17 be analyzed using the same factors."); Supplemental Directive 09-01, ECF No. 26-
18 2 at 4. The ECOA also contains a notice requirement: "Each applicant against
19 whom adverse action is taken shall be entitled to a statement of reasons for such
20 action from the creditor." 15 U.S.C. § 1691(d)(2). An "adverse action" is a "denial
21 or revocation of credit, a change in the terms of existing credit arrangement, or a
22 refusal to grant credit in substantially the amount or on substantially the terms
23 requested." 15 U.S.C. § 1691(d)(6). When a creditor fails to give the required
24 notice when taking an adverse action, the applicant may sue for a violation of the
25 ECOA. *Schlegel*, 720 F.3d at 1210.

26 Although the Ninth Circuit in *Schlegel* did not explicitly say the ECOA notice
27 provisions are distinct from the anti-discrimination provisions, some courts in the
28 Ninth Circuit have found the notice provisions to give rise to a cause of action even

1 with no accompanying claims of discrimination. *Errico v. Pac. Capital Bank,*
 2 *N.A.*, 753 F. Supp. 2d 1034, 1042 (N.D. Cal. 2010); *Vasquez*, 2013 WL 6001924, at
 3 *11. This reading is supported by the regulations implementing the ECOA, which
 4 say in part, "The regulation prohibits creditor practices that discriminate on the
 5 basis of any of these [listed] factors. The regulation also requires creditors to notify
 6 applicants of action taken on their applications...." 12 C.F.R. § 202.1(b).

7 Defendant Wells Fargo argues because it decided that Plaintiff was not entitled
 8 to a loan modification (Comp. ¶72), only the "adverse action" requirements of 12
 9 C.F.R. § 202.9(a)(1)(i)-(iv) are potentially applicable here and Wells Fargo's
 10 denial of the application did not constitute an "adverse action" that triggered the
 11 ECOA's notice requirements. Defendant Wells Fargo refused to extend credit
 12 because she is an elderly, female person (Compl. ¶71.), Defendant Wells Fargo did
 13 not provide a written explanation or statement of reasons for its refusal to consider
 14 Plaintiff's mortgage assistance application under HAMP (Compl. ¶72.). As such,
 15 Defendant Wells Fargo failed to comply with the notice requirements of 15
 16 U.S.C. §1691.

17 Defendant Wells Fargo also argues that Plaintiff cannot claim any damage
 18 when she does not fit within the requirements on the Loan amount and there is
 19 nothing in the statute to establish that an application for a HAMP modification
 20 constitutes an application for "credit" under the ECOA.

21 To state a claim under ECOA, a plaintiff must allege that: "(1) she is a member
 22 of a protected class; (2) she applied for credit with defendants; (3) she qualified
 23 for credit; and (4) she was denied credit despite being qualified." *Hafiz v.*
 24 *Greenpoint Mortg. Funding, Inc.*, 652 F.Supp.2d 1039, 1045 (N.D.Cal.2009)
 25 (citing *Chiang v. Veneman*, 385 F.3d 256, 259 (3d Cir.2004)). Under this standard,
 26 Plaintiff's Complaint states a prima facie claim. First, Plaintiff does allege that she
 27 is a member of a class protected by ECOA (Compl. ¶ 70.). Plaintiff adequately
 28 alleges that the HAMP modification application was an application for "credit," as

1 that term is used in the context of ECOA (Compl. ¶ 70.) she qualified for credit
 2 and she was denied credit despite being qualified (Compl. ¶¶ 70, 71.) Defendant
 3 Wells Fargo's reliance on the Notice of Trustee's Sale's default figure amounts is
 4 misplaced (*See* Def. MTD pg. 21).

5 While the Court can and will take judicial notice of the existence of documents
 6 purporting to identify the scope of Plaintiff's indebtedness, which does not
 7 necessarily correlate with a conclusion that the numbers contained in those
 8 documents are accurate. For purposes of a motion to dismiss, those allegations
 9 must be accepted as true and construed in Plaintiff's favor. *See Livid Holdings Ltd.*
 10 *v. Solomon Smith Barney, Inc.*, 417 F.3d 940, 946 (9th Cir. 2005). The Court
 11 simply cannot make a determination at the pleadings stage that all of Defendant
 12 Wells Fargo figures are necessarily accurate. Given Plaintiff's claims at this
 13 juncture that she qualified for a loan modification and that Defendant Wells Fargo
 14 refused to provide a proper loan modification review, Plaintiff's Complaint
 15 survives a pleading challenge at this time.

16 **H. PLAINTIFF HAS STATED A CLAIM UNDER ELDER**
 17 **FINANCIAL ABUSE.**

18 Defendant Wells Fargo argues that Plaintiff failed to allege facts to
 19 support a cause of action for Elder Abuse because denial of a loan modification
 20 does not constitute financial elder abuse and foreclosing on a defaulted loan does
 21 not amount to financial elder abuse. Defendant Wells Fargo also argues that
 22 Plaintiff's Complaint pleads no facts to show that an officer, director or managing
 23 agent of Wells Fargo authorized or ratified the alleged abuse or neglect. Cal. Welf.
 24 and Inst. Code § 15657(c). (*See* Def. MTD pgs.21, 22).

25 California's Elder Abuse Act, Welfare and Institutions Code Section 15600, *et*
 26 *seq.*, was enacted to protect elders by providing enhanced remedies which
 27 encourage private, civil enforcement of laws against elder abuse and neglect.
 28 *Intrieri v. Superior Court*, 117 Cal.App.4th 72, 82, 12 Cal. Rptr.3d 97 (2004); *In re*

1 *Conservatorship of Kayle*, 134 Cal.App.4th 1, 5-6, 35 Cal. Rptr.3d 671 (2005).

2 Section 15610.30 of the Act provides that financial abuse of an elder occurs, *inter*
 3 *alia*, when a person or entity, acting in bad faith: "Takes, secretes, appropriates, or
 4 retains real or personal property of an elder or dependent adult to a wrongful use or
 5 with intent to defraud, or both." Cal. Welf. & Inst. Code §15610.30(a)(1). Under
 6 the same section, a person who assists in the foregoing conduct is also liable.
 7 Cal. Welf. & Inst. Code §15610.30(a)(2).

8 Plaintiff's allegations are sufficient to state a claim under the Elder Abuse Act.
 9 Plaintiff alleges that Defendant Wells Fargo is a benefactor of the Troubled Asset
 10 Relief Program (TARP), and is under contract with the U.S. Department of the
 11 Treasury and Wells Fargo intent was to profit from the fees collected from the U.S.
 12 Government without evaluating Plaintiff for loan modification under the
 13 appropriate mortgage assistance program (Compl. ¶ 79.).

14 Plaintiff further alleges that:

15 The foregoing acts of the Defendants, and each of them, were done with the
 16 intent of obtaining Plaintiff's home by way of wrongful foreclosure and were
 17 further done with the intent of defrauding Plaintiff. (Compl. ¶ 80.).

18 For purposes of Fed.R.Civ.P. 12(b)(6), these allegations are sufficient to state a
 19 claim for wrongful "taking" pursuant to Cal. Welf. & Inst. Code §15610.30.

20 Accordingly, Defendant Wells Fargo motion to dismiss Plaintiff's fifth claim
 21 for elder abuse on the basis of failure to state a claim should be denied.

22 **III. CONCLUSION**

23 Based upon the foregoing, Plaintiff hereby requests that Defendant's motion to
 24 dismiss be denied. Alternatively, Plaintiff respectfully requests leave to file an
 25 amended complaint pursuant to Fed. R. Civ. P. 15(a)(2) should Defendant's motion
 26 be granted.

1 Dated: December 2, 2015

Respectfully submitted,

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3 LAW OFFICES OF JUANITA V. MILLER

4 By: Juanita V. Miller
5 Juanita V. Miller, Esq.
6 Attorneys for Plaintiff, Nahid Houman
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CERTIFICATE OF SERVICE

I, Juanita V. Miller, Esq., do hereby declare as follows:

1. That I am employed in the County of Los Angeles, State of California. I am over the age of 18 and I am not a party to the within action. My business address is 14930 Ventura Boulevard, Suite 200, Sherman Oaks, California 91403.

2. That on **DECEMBER 2, 2015**, I served the following document described as:

**PLAINTIFF NAHID HOUMAN'S OPPOSITION TO
DEFENDANT WELLS FARGO BANK, N.A.'S NOTICE
OF MOTION AND MOTION TO DISMISS COMPLAINT;
MEMORANDUM OF POINTS AND AUTHORITIES**

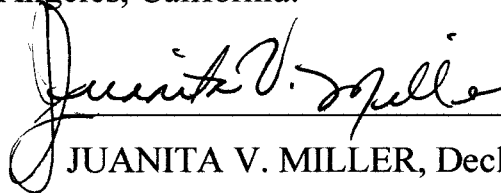
on the interested parties in this action **Electronically Via the Court's
CM/ECF System::**

Attorneys for Defendant:

*WELLS FARGO BANK, N.A., successor by
merger with Wells Fargo Bank Southwest, N.A.,
f/k/a Wachovia Mortgage, FSB, f/k/a World
Savings Bank, FSB, erroneously sued here
separately as Wells Fargo Home Mortgage
("Wells Fargo")*

Jeremy E. Shulman, Esq.
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CAMPBELL & TRYTTEN LLP
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2 I declare under penalty of perjury under the laws of the United States of
3 America that the foregoing is true and correct, that I am a member of the Bar of the
4 United States District Court, Central District of California and that this declaration
5 is executed on December 2, 2015 at Los Angeles, California.

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8 JUANITA V. MILLER, Declarant
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